**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | |
| Interpretation of the Terms "Multichannel | ) | MB Docket No. 12-83 |
| Video Programming Distributor" and | ) | |
| "Channel" As Raised in Pending Program | ) | |
| Access Complaint Proceeding | ) | |

# COMMENTS OF ABC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, AND NBC TELEVISION AFFILIATES


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May 14, 2012

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## Summary

Although the Media Bureau's resolution of the statutory interpretation issues raised in this proceeding will have profound and far-reaching implications, the task of statutory construction in this instance is not complex.

The term "multichannel video programming distributor" ("MVPD") is defined broadly in Section 602(13) of the Communications Act of 1934 as "a person such as, *but not limited to*, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming" (emphasis added). That definition is expressly flexible, open-ended, and untethered to then-current technology. By its plain terms, it is amply broad enough to encompass entities that distribute multiple linear streams of video programming to subscribers by means of a broadband Internet connection rather than via cable, satellite, telco, or microwave.[*]

That programming providers utilizing the Internet for delivery are not listed among the enumerated examples of MVPDs is without significance, as the 1992 Cable Act, which added the statutory definition, preceded the widespread availability of broadband Internet access by many years. The facially expansive statutory definition should not be read to *exclude* entities that distribute multiple streams of video programming via a technology that was still nascent when the language was enacted. It has long been settled that statutory language is not frozen in time but should, consistent with legislative intent, account for technological developments. *See, e.g.,*

[*] In order to resolve the issue at hand in the pending program access complaint proceeding, it is not necessary for the Media Bureau to decide whether or in what circumstances the definition of MVPD should encompass Internet-based distributors of *non-linear* programming, such as Netflix and Hulu Plus.

*United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968). The expressly open-ended and flexible statutory definition of "MVPD" should be read to account for technological developments in the years since its 1992 enactment.

The broad statutory definition also cannot be limited by the technology-specific definitions of the terms "channel" and "cable channel" that appear elsewhere in the statute. *See* 47 U.S.C. § 522(4) (defining the terms interchangeably to mean "a portion of the electromagnetic frequency spectrum which is *used in a cable system* and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)" (emphasis added)). Congress clearly used the term "channel" in Section 602(13) in an everyday, non-technical sense to mean a stream or network of video programming. A contrary conclusion would render Sections 602(13) and 602(4) hopelessly irreconcilable and the statutory definition of MVPD largely meaningless, as the non-cable entities expressly identified as MVPDs by statute (such as DBS and MMDS) are incapable of delivering "channels" of programming via a "cable system." It is an elementary principle of statutory interpretation that a statute should be read, whenever possible, to give all of its words meaning. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 829 (1985). All of the words of Section 602(13) have meaning if, and only if, the term "channel" used in that section is construed in an everyday, non-technical sense.

Likewise, the broad statutory definition of MVPD should not be read to require that an entity provide both video programming and a transmission path by which the programming reaches the subscriber. Nothing in the plain language of Section 602(13) imposes a transmission path requirement, and no such requirement *implicit* in the technical definitions of "channel" and "cable channel" should be read as a limitation upon the far broader term "MVPD." Indeed, the Commission has already decided that an entity need not "operate the vehicle for distribution" of

programming to qualify as an MVPD because "the plain language of Section 602(13) imposes no such requirement." *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301, ¶ 171 (1996). Nor should a single reference to "facilities-based" competition in the legislative history of the 1992 Cable Act be read as a limitation upon the broad statutory definition of "MVPD," which includes no reference to the provision of a transmission "path" or "facility." The Commission recognized nearly 20 years ago that an entity need not provide a "facilities-based" service in order to serve as a source of competition to traditional MVPDs. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5651-52 (1993).

Distributors of video programming that use the Internet for delivery are similar to traditional MVPDs in a fundamental way that warrants their inclusion within the statutory definition: They deliver multiple streams of linear video programming to subscribers. For that reason alone, the expansive statutory definition should be read to encompass them. A contrary reading of the statute could have dire consequences for television broadcasters and the important public interest they serve, as (among other things) such programming providers would then not be obligated to obtain a television station's consent before retransmitting its broadcast signal as required by Section 325(b) of the Communications Act. Such a result would not only contradict Congress's clearly stated, express intention that "*anyone engaged in retransmission consent by whatever means*" obtain a station's retransmission consent, S. REP. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991) (emphasis added), but it would also directly and significantly undermine the important public purposes served by the retransmission consent regime and thereby pose a serious threat to over-the-air broadcasting.

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**COMMENTS OF**
**ABC TELEVISION AFFILIATES ASSOCIATION,**
**CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, AND**
**NBC TELEVISION AFFILIATES**

The ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates (the "Affiliates Associations")[1] submit these comments in response to the Public Notice ("*Notice*"), released March 30, 2012, seeking comment on the meaning of the terms "multichannel video programming distributor" ("MVPD") and "channel" as set forth in the Communications Act of 1934, as amended, ("the Act") and the Commission's rules.[2] As the Commission has acknowledged in a related matter, the agency's resolution of these meanings could have "profound" and "far-reaching" implications.[3]

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[1] Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network.

[2] *See* Public Notice, *Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, DA 12-507 (March 30, 2012).

[3] *See* FCC, Opposition of the Federal Communications Commission to Sky Angel's Petition for a Writ of Mandamus, *In re Sky Angel U.S., LLC*, No. 12-1119 (filed Apr. 5, 2012,
(continued . . .)

In seeking comment on the most appropriate interpretation of these terms, the *Notice* proposes two alternative definitions of the term "MVPD": one would "treat as MVPDs only those entities that make available for purchase both a transmission path (capable of delivering 'video programming') and content (multiple streams of 'video programming')," while the other would treat as an MVPD any entity that "makes available for purchase multiple 'video programming networks,' without regard to the whether it offers a transmission path."[4] In light of the inarguably broad statutory definition of "MVPD," the Affiliates Associations respectfully suggest that, while the implications may be profound and far-reaching, the fundamental questions posed by the *Notice* are not complex. The expansive language of Section 602(13) of the Act is sufficiently broad, on its face, to bring within its reach entities that distribute multiple streams of linear programming to subscribers via an Internet broadband connection. For this reason, the Affiliates Associations submit that only the latter of the two definitions proposed in the *Notice* is "consistent with the text, purpose, legislative history, and structure of the statutory definitions and the provisions of the Act in which the terms are used."[5] A contrary definition of MVPD that does not encompass Internet-based distributors of video programming would be vastly under-inclusive and could have dire implications for television broadcasters and the important public interest they serve.

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(. . . continued)
D.C. Cir.), at 17.

[4] *Notice*, ¶¶ 6, 11.

[5] *Notice*, ¶ 7.

## I. The Broad Statutory Definition of MVPD Should Be Read to Include Programming Distributors That Utilize the Internet for Delivery

### A. The Statutory Language Indicates That Programming Distributors That Utilize the Internet for Delivery Are Included Within the Definition of "MVPD"

The Communications Act broadly defines a "multichannel video programming distributor" or MVPD as:

> a person ***such as, but not limited to***, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

47 U.S.C. § 522(13) (emphasis added). The Commission has defined the term similarly, if not even more broadly, as:

> an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities ***include, but are not limited to***, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

47 C.F.R. § 76.1000(e), § 76.1300(d) (emphasis added).[6]

Both statutory and regulatory definitions are purposefully flexible and broad in scope, expressly open-ended, and deliberately untethered to then-current technology. The Commission repeatedly has recognized as much.[7] The statutory and regulatory definitions of "MVPD," by

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[6] *See also* 47 C.F.R. § 76.64(d); 47 C.F.R. § 76.71(a).

[7] *See, e.g.*, *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301, ¶ 171 (1996) ("[T]he list of entities enumerated in [Section 602(13)] is expressly a non-exhaustive list."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 2997 (1993) ("[T]he list of multichannel distributors (continued . . .)

their plain terms, are easily broad enough to encompass entities that distribute multiple linear streams of video programming using the Internet (rather than cable or satellite or telco or microwave) to transmit the programming to subscribers.[8]

The examples of MVPDs listed in the statute and regulation plainly are intended to be illustrative rather than limiting. It is unsurprising the illustrative list does not include online or Internet-based video programming distributors, as the 1992 Cable Act preceded widely available broadband Internet access by many years. That fact, however, provides no reason for reading the plainly expansive statutory definition to *exclude* entities that distribute video programming via a technology that was still nascent when the language was enacted.

It is well settled, and has been recognized repeatedly and in a variety of contexts, that statutory language is not frozen in time as of its enactment but can and should, consistent with legislative purpose, take account of technological developments. As the Supreme Court declared, in determining that regulation of community antenna television ("CATV") systems fell within Commission's broad authority to regulate "all interstate . . . communication by wire or radio":

> Nothing in the language of [47 U.S.C.] § 152(a), in the surrounding language, or in the Act's history or purpose limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other

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(. . . continued)
in the definition is not meant to be exhaustive . . . ."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8065, ¶ 42 (1992) (observing that the statutory definition of "MVPD" is "broad in its coverage").

[8] The Affiliates Associations submit that the Media Bureau need not decide in this proceeding (and perhaps should not decide absent full notice-and-comment rulemaking) whether or in what circumstances the definition of MVPD should encompass Internet-based distributors of *non-linear* programming (such as Netflix and Hulu Plus). *See Notice*, ¶¶ 13-14.

> provisions. . . . Certainly Congress could not in 1934 have foreseen the development of [CATV] systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission" . . . that it conferred upon the Commission a "unified jurisdiction" and "broad authority."

*United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968) (citations and footnotes omitted); *see also Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005) ("*CALEA Order*"), ¶ 1 (concluding that the Communications Assistance for Law Enforcement Act ("CALEA"), enacted in 1994, "applies to facilities-based broadband Internet access providers and providers of interconnected voice over Internet Protocol (VoIP) service. This Order is the first critical step to apply CALEA obligations to new technologies and services that are increasingly relied upon by the American public to meet their communications needs."), *aff'd by American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).[9]

"Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West v. Gibson*, 527 U.S. 212, 218 (1999) (citing cases). Technological developments in the years

[9] *See also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("When technological change has rendered [a statute's] literal terms ambiguous, the . . . Act must be construed in light of [its] basic purpose." (footnote omitted)); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395-96 (1968) (concluding that judicial "inquiry cannot be limited to ordinary meaning and legislative history" where the statute at issue "was drafted long before the development of the electronic phenomena" at issue and that Court instead "must read the statutory language of 60 years ago in light of drastic technological change" (footnotes omitted)); *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 706 (D.C. Cir. 2011) (observing that Congress is "[h]ardly clairvoyant, especially with respect to rapidly evolving technologies"); *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d 411, 411 (6th Cir. 1925) (declaring that a "statute may be applied to new situations not anticipated by Congress if, fairly construed, such situations come within its intent and meaning") (considering application of Copyright Act to radio broadcast).

since the statutory definition of MVPD was enacted have facilitated new methods for the provision of multiple video programming streams to consumers. Those changes in the world call for application of the statutory term—which Congress defined in a deliberately open-ended fashion—to entities that deliver multiple linear streams of video programming to subscribers via the Internet.

The construction of the term "MVPD" must be consistent with statutory language and legislative intent, and it also must comport with common sense. Common sense dictates that distributors delivering via the Internet programming streams similar to the programming delivered by "traditional" MVPDs should be considered MVPDs as well, without regard for the mechanics of the delivery of those programming streams to the subscriber. The Affiliates Associations therefore suggest that the Media Bureau can and should interpret the term "multichannel video programming distributor" as it is defined in Section 620(13) in a common-sense fashion to encompass all entities that distribute multiple streams or networks of linear video programming to subscribers, including those that deliver that programming via the Internet.[10]

### B. The Statutory Definition of "MVPD" in Section 602(13) Should Not Be Read to Incorporate the Definition of "Channel" Contained in Section 602(4)

The statutory definition of MVPD in Section 602(13) of the Act does not define the term "channel." Moreover, Section 602(13) does not expressly incorporate the definition of "channel" that appears in Section 602(4), where the terms "channel" and "cable channel" are defined

[10] Because the broad and flexible statutory definition plainly encompasses such entities, the Affiliates Associations see no need to propose or consider alternate definitions of the term.

interchangeably as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)." 47 U.S.C. § 522(4).[11] Nevertheless, the Media Bureau has inquired whether it could "reasonably read the definition of 'MVPD' adopted . . . in the 1992 Cable Act and which includes the term 'channels,' not to incorporate by reference the preexisting definition of 'channel' contained in the same provision of the Communications Act."[12] The Affiliates Associations suggest that, as a fundamental matter of both statutory construction and common sense, the Bureau *cannot* read the highly technical statutory definition of "channel" as a limitation upon the otherwise expansive definition of MVPDs. Instead, it is plain that Congress in Section 602(13), as it has done elsewhere, used a term with a potentially technical meaning "in the everyday sense in which it has been used in discussions of communications policy issues."[13]

If the statutory definition of "channel" were strictly and literally incorporated into the definition of MVPD, and thus the requirement that a channel be "used in a cable system" were construed as an absolute definitional limit, then the non-cable entities that are among the statutorily enumerated MVPDs—such as DBS and MMDS—would actually not be MVPDs themselves since none could meet the statutory definition of a "cable system." That result would

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[11] The Commission's regulatory definitions of "cable television channel" similarly incorporate the definitional element of a "signaling path provided by a cable television system." *See* 47 C.F.R. § 76.5(r)-(u).

[12] *Notice*, ¶ 7. The Notice does not acknowledge that the statute treats "channel" and "cable channel" as equivalent, expressly synonymous terms. *See* 47 U.S.C. § 522(4).

[13] *Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, 5356 (1999) ("'Transmission technology' is not a defined term in the Communications Act nor does the legislative history help to define its breadth. Rather, Congress appears to have used the phrase in the everyday sense in which it has been used in discussions of communications policy issues.").

obviously be an absurdity.

Plainly, neither the Commission nor the enacting Congress itself viewed "use[] in a *cable* system" as determinative of the question whether an entity can be considered as an MVPD that provides "multiple *channels* of video programming." If the definition of channel were read technically to limit "channels" to those provided by cable systems, Section 602 (and, in particular, subsections (4) and (13)) would be hopelessly irreconcilable, and only cable systems, but none of the other entities expressly enumerated as MVPDs, would be capable of providing "channels" of programming. There is simply no reason to read the statute to divest Section 602(13)'s definition of its meaning. *See, e.g.*, *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("A literal reading of [statutory provisions] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) (where plain meaning of statutory language "has led to absurd or futile results . . . th[e] Court has looked beyond the words to the purpose of the Act"; even where "plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole th[e] Court has followed that purpose, rather than the literal words" (footnotes and internal quotation omitted)); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (construing statutory language that, "if interpreted literally, produces an absurd, and perhaps unconstitutional, result").

It is, to the contrary, an elementary and "common-sense principle of statutory construction that sections of a statute generally should be read 'to give effect, if possible, to

every clause.'"[14] *All* of the words of Section 602(13) have meaning if, and only if, "channel" is construed in a non-technical fashion and not read to incorporate the expressly cable-specific definition contained in Section 602(4).[15]

In addition, the legislative history of the 1992 Cable Act indicates that Congress contemplated, or at least was aware of, a non-technical definition of the term "channel." *See, e.g.*, S. REP. 102-92, 1992 U.S.C.C.A.N. 1133, 1157 ("It is difficult to believe a cable system would not carry the sports *channel*, ESPN, or the news *channel*, CNN." (emphases added)); *id*. at 1158 (noting that an incumbent cable operator might have incentive to offer an affiliated programmer "a more desirable *channel* position than another programmer" (emphasis added)). Moreover, the Commission itself has repeatedly used the term "channel" in the same non-technical way to refer to a programming network or stream.[16] The Media Bureau should not

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[14] *Heckler v. Chaney*, 470 U.S. 821, 829 (1985) (quoting *United States v. Menasche*, 348 U.S. 528, 539-39 (1955)). *See also, e.g., Ransom v. FIA Card Servs., N.A.*, 131 S.Ct. 716, 724 (2011) ("each word in a statute should" "carr[y] meaning"); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (invoking "the settled rule that we must, if possible, construe a statute to give every word some operative effect"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

[15] As the Commission has acknowledged, the definition of "channel" was added by the 1984 Cable Act, which (in keeping with its title) "focused exclusively on the regulation of cable television." *See Notice*, ¶ 7. A statutory definition of the interchangeable terms "channel" and "cable channel" that focused upon the particular programming distribution technology that was under legislative consideration is to be expected. It does not follow that use of the (potentially ambiguous) term "channel" elsewhere in the statute, and in Section 602(13) in particular, should likewise be confined to the technology-specific definition of "channel" that Congress enacted in 1984.

[16] *See, e.g., Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272, 3278, ¶ 13 (1997) (ruling that "compliance [with closed captioning rules] is measured on a channel-by-channel basis, and thus the captioned programs will reflect the overall diversity of the many *channels* of programming now available" (emphasis added)); *id*. at 3309, ¶ 79 (declaring that "it is important to increase the availability of closed captioning (continued . . .)

depart from that analysis here, because to do so would effectively read much of Section 602(13) out of the statute altogether.

### C. Nothing in the Statutory Definition Requires an MVPD to Provide a "Transmission Path" for Delivery of Programming to the Subscriber

The Media Bureau's previous tentative conclusions that both the statutory and regulatory definitions of "channel" "*appear to* include a transmission path as a necessary element,"[17] and that an MVPD thus must itself own, operate, and/or provide the means of transmission to the viewer, are without foundation.[18] As explained above, the definition of MVPD should not be

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(. . . continued)
on each *channel* of video programming over the transition period to provide persons with hearing disabilities a wide range of programming choices" (emphasis added)); *id*. at 3276-77, ¶ 7 (observing that "the number of *channels* of video programming continues to increase" (emphasis added)); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 619, ¶ 161 (2009) (noting that "Comcast has entered into an agreement with Jump TV to allow Comcast's Internet subscribers to view 225 TV *channels* from around the world" (emphasis added)); *id*. at 648, ¶ 221 (observing that "[a] number of cable operators launched family-friendly programming tiers early in 2006" and pointing, as an example, to Time Warner's "package [that] offers 15 family-friendly channels that can be ordered by any customer who subscribes to the minimum basic service tier"); *id*. at 655, ¶ 238 (discussing children's programming on cable television and noting, among other things, that EchoStar offers subscribers access to "BabyFirst TV, the nation's first and only channel dedicated to babies and toddlers"); *id*. at 676-77, ¶ 283 (reporting that "MVPDs in many foreign markets offer programming on an a la carte basis or in mixed bundles, themed tiers, and subscriber-selected tiers," such as PCCW's IPTV service, which provides a "basic free package of 21 channels includ[ing] traffic, weather, local news, and the Hong Kong Disneyland channel" and offers subscribers the ability to add "premium channels includ[ing] movies, music, news, sports, and children's programming"); *id*. at 678, ¶ 285 (observing that "[t]here are nearly 30 premium channels available" in certain cities in India via set-top box, "including National Geographic Channel, Disney Channel, Animal Planet, Discovery Channel, Cartoon Network, CNN, and HBO").

[17] *Sky Angel Standstill Denial*, 25 FCC Rcd at 3883, ¶ 7 (emphasis added).

[18] The fact that the statutory copyright license in Section 111 of the Copyright Act, 17 U.S.C. § 111, is, expressly, only available to a facilities-based entity that provides a transmission (continued . . .)

read to include the technology-specific definition of "cable channel" in Section 602(4); for that reason, no "transmission path" requirement *implicit* in the definition of "channel" can limit the scope of the definition of "MVPD." And nothing in the broad statutory definition of "MVPD" demands that an entity provide (let alone itself own or control) a "transmission path" for the delivery of the programming signal in order to be considered an MVPD. In short, nothing in the *statute* demands the provision of a "transmission path"; the particulars (of type or ownership) of the "path" by which programming reaches the subscriber are thus irrelevant to an entity's status as an MVPD.

The Media Bureau's earlier contrary conclusion ignores Commission precedent, which has long concluded that an entity need not own or operate the distribution system used to transport programming in order to come within the definition of MVPD. More than 15 years ago, the Commission found the "argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement."[19] The Commission was correct: The statutory definition of MVPD does not require the programming provider itself to

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path (via "wires, cables, microwave, or other communications channels," 17 U.S.C. § 111(f)(3)) does not require the same interpretation to be applied to an MVPD under the Communications Act. It is self-evident that the term MVPD under the Communications Act is much broader than the meaning of "cable system" under Section 111 of the Copyright Act since the term MVPD encompasses satellite carriers which do not qualify for the Section 111 statutory license but instead required enactment of separate statutory licenses in Sections 119 and 122 of the Copyright Act.

[19] *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301, ¶ 171 (1996); *see also id*. at 20301 n.414 (citing, without disagreement, comment that "the fact that most open video system programming providers will use another party's network has no relevance under Section 602(13)").

own or operate the "transmission path" by which programming is delivered.

That the illustrative, but non-exhaustive, list of MVPDs contains entities that traditionally have provided both programming content and a transmission path is beside the point. The conclusion that the definition of MVPD includes an implicit "transmission path" requirement supposes that Congress intended a narrow and relatively immutable definition largely tied to the technology as it existed at the time of the 1992 statutory enactment, not a flexible and open-ended definition intended to accommodate technological development in an admittedly fluid and fast-changing field. Regulation of broadcasting and the distribution of video programming must be mindful of the rapid technological advances that have long characterized the field. As the Supreme Court has recognized on more than one occasion, "'[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to those factors.'" *Southwestern Cable*, 392 U.S. at 172-73) (alterations in original) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)). There is no reason, and certainly no basis in the statute, to conclude that Congress intended to put in place a less accommodating regulatory regime for the present context. For these reasons, it is not necessary for the Media Bureau to determine whether the Internet itself constitutes a "transmission path" since a transmission path is not essential to an entity's status as an MVPD.

It is equally insignificant that the legislative history of the 1992 Cable Act makes a single reference to an intention to promote "facilities-based" competition.[20] That single reference to

[20] *See Notice*, ¶ 8 & n.33.

"facilities-based" competition in the House Conference Report cannot be read as a limitation upon the otherwise broad statutory definition of MVPD, which includes no reference to the provision of a transmission "facility" or "path."[21] The Commission has already recognized that an entity need not provide a "facilities-based" service in order to serve as a source of competition to traditional MVPDs. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5651-52 (1993) ("[B]y including television receive-only satellite programming distributors in the definition of a multichannel video programming distributor, Congress showed that ***a distributor need not be facilities-based*** in order to come within the scope of the effective competition test. We agree . . . that a qualifying distributor need not own its own basic transmission and distribution facilities." (emphasis added; footnotes omitted)).

In any event, even if the Media Bureau were correct to assume that entities considered MVPDs under the statute must be "similar" to those included in the non-exhaustive list,[22] nothing in the statutory language, purpose, or legislative history indicates that that "similarity" must include the mechanical or technical manner of delivering the programming signal.

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[21] *Cf. American Council on Educ. v. FCC*, 451 F.3d 226, 235 (D.C. Cir. 2006) (rejecting an appellant's argument that "focuses on a single word in a single sentence in a single footnote from [an FCC] Order"), *aff'g Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005).

[22] *See Sky Angel Standstill Denial*, 25 FCC Rcd at 3883 ¶ 7 & n.41 (concluding that the illustrative list of MVPDs is preceded by the phrase "such as," which "suggests that other covered entities should be similar to those listed"). Of course, if the phrase "such as" directly preceded the enumerated list of MVPDs, that list might fairly be read to require strict similarity to the listed entities. In Section 602(13), the phrase "such as" is immediately followed by "***but not limited to***," suggesting a significantly more expansive notion of "similarity" as a yardstick for determining MVPD status.

Distributors of linear programming via the Internet are similar to the entities in the illustrative list in Section 602(13) in an indisputably fundamental way—namely, they are engaged in the delivery of multiple linear streams of video programming by wire or other communications channels to subscribers. The Media Bureau cannot escape the conclusion that Section 602(13) should be interpreted not to require that the programming distributor itself own or provide the "transmission path" by which the programming stream is delivered to the subscriber, a reading that comports with the broad statutory definition of MVPD, the legislative purposes underlying the 1992 Cable Act, and long-established Commission precedent.

## II. A Determination That Programming Distributors That Utilize the Internet for Delivery Are Not MVPDs Would Be Unlawfully Discriminatory and Inconsistent with the Congressional Mandate of Section 325

The "public interest ramifications" of a Bureau or Commission decision that held that distributors using the Internet for delivery of programming are not MVPDs "and therefore are not required to comply with legal requirements applicable to MVPDs"[23] would create an asymmetrical and unlawfully discriminatory regulatory scheme.[24] Most critically for

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[23] *Notice*, ¶ 8.

[24] The Commission has long recognized the significance of the definition of "multichannel video programming distributor." *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8065, ¶ 42 (1992) ("The scope of th[e] definition [of 'MVPD'] is important for two reasons: (1) it defines the entities subject to the retransmission consent requirement; and (2) 'multichannel video program programming distributor' is used extensively in other parts of the 1992 Act, *e.g.*, in connection with the effective competition definition (Section 3), program access (Section 9), program ownership (Section 11), program carriage agreements (Section 12), and equal employment opportunity (Section 22)."). The definition of MVPD also will have material consequences for a number of pending proceedings. *See, e.g., Video Device Competition, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility*
(continued . . .)

broadcasters, it would open the door for program distributors that are not considered a "cable system or other multichannel video programming distributor" to contend they are not required to obtain a television station's consent before retransmitting its broadcast signal under Section 325(b) of the Act. Already various entities, such as ivi.tv, FilmOn.com, and Aereo, that have used the Internet to stream broadcast television signals have taken the position that they are not "MVPDs" and thus are not required to obtain the consent of a station before retransmitting its signal. But programming distributors that utilize the Internet cannot be left to retransmit television broadcast signals online at will, leaving broadcast stations both unable to control the distribution of their signals over the Internet and unable to recapture the value of retransmission and resale of their signal, as this would have obvious and potentially devastating consequences for broadcasters.[25]

Such a result would seriously undermine the purpose of the retransmission consent regime and the weighty public interests that regime is intended to serve. *See, e.g.*, S. REP. 92-102, 1992 U.S.C.C.A.N. 1133, 1168 (1991) (observing that the retransmission consent provisions "establish the right of broadcast stations to control the use of their signals by cable systems and other multichannel video programming distributors" in order to correct "a

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(. . . continued)
*Between Cable Systems and Consumer Electronics Equipment*, Notice of Inquiry, 25 FCC Rcd 4275 (2010).

[25] Certain programming distributors that rely on the Internet for delivery have claimed that they are entitled to the benefits of the statutory copyright license in Section 111 of the Copyright Act but have insisted that they are not MVPDs and thus need not obtain retransmission consent from broadcasters. ivi.tv and FilmOn.com are two such entities that have already asserted such claims and have been engaged in litigation over the issue. Aereo has taken the position that it does not even need the statutory copyright license, let alone retransmission consent, and it, too, is currently engaged in litigation over these issues.

distortion in the video marketplace which ***threatens the future of over-the-air broadcasting***" (emphasis added)).[26] Such a result would also contradict Congress's clearly stated intention that "***anyone engaged in retransmission consent by whatever means***" obtain a station's retransmission consent. *Id.*, 1992 U.S.C.C.A.N. at 1167 (emphasis added) ("The Committee believes, based on the legislative history of [Section 325(b)], that Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means."). It is an elementary principle of statutory construction that the definition of MVPD should not be interpreted to work such a result. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011) (rejecting interpretation of statutory language that "would undermine the Act's basic objectives"); *cf. Jerome H. Remick & Co.*, 5 F.2d at 411 ("While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries."); *Southwestern Cable*, 392 U.S. at 173, 175 (noting that the Commission "reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities" and that failure to regulate could jeopardize the "achievement of [the] purposes" underlying the Act).

Likewise, a ruling that distributors of video programming via the Internet are, by definition, not MVPDs because they do not themselves provide the "transmission path" by which programming is delivered to subscribers would invite circumvention of the retransmission

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[26] *See also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663 (1994) (recognizing that "the importance of local broadcasting outlets can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population"; likewise, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment" (internal quotations omitted)).

consent regime: Programming distributors utilizing the Internet, and even "traditional" MVPDs such as cable and satellite companies, would attempt to avoid the retransmission consent requirements simply by creating affiliated entities and/or entering into contractual arrangements with third parties for the delivery of programming via an Internet service provider or wireless broadband.[27] Neither the Communications Act nor the Commission's retransmission consent regime suggests that such an easily-circumvented regulatory scheme would be lawful, as it would leave the determination of MVPD status (and the obligation to comply with the retransmission consent regime and other regulatory obligations) essentially in the hands of the regulated or to-be-regulated entities. The Commission should not countenance a regulatory regime that inevitably produces such blatantly asymmetrical results. *See generally Federal Energy Regulatory Comm'n v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1983) ("Agencies must implement their rules and regulations in a consistent, evenhanded manner."); *Sharron Motor Lines, Inc. v United States*, 633 F.2d 1115, 1116-17 (5th Cir. 1981) (federal agencies "must act in an evenhanded manner in performing [their] regulatory duties" (citing cases)).

Nor is a test for MVPD status that turns on the particulars of the contractual arrangement or other legal relationship between the distributor of content and the entity that actually furnishes

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[27] Indeed, several incumbent cable providers, DBS systems, and other traditional MVPDs currently (or plan in the near future to) make programming available to their subscribers via the Internet. *See, e.g., DISH Network Introduces America's First True TV Everywhere Offering*, DISH Network, LLC (Nov. 18, 2010), *available at* http://press.dishnetwork.com/Press-Center/News-From-DISH/page/DISH-Network-Introduces-America-s-First-True-TV-Ev) (announcing that "DISH Network L.L.C. today became the first pay-TV provider in America to introduce a true TV Everywhere™ offering, giving DISH Network subscribers the ability to watch all of their live and recorded television programs on compatible smartphones, tablets and laptops").

the "distribution path" a feasible alternative. Such a regulatory definition would be unpredictable, unnecessarily complicated, and, ultimately, "unworkable." The questions and hypotheticals outlined in the *Notice* prove the point: The Media Bureau speculates about a regulatory regime in which a joint marketing arrangement between an online video programming distributor and a broadband Internet provider would not bring the content distributor within the MVPD definition but a joint venture between the same two parties would do so.[28] As the *Notice* anticipates, a regulatory scheme that would permit content distributors to circumvent MVPD status so easily would invite manipulation and abuse (including, as discussed above, easy avoidance of the retransmission consent regulatory system). The Affiliates Associations question the utility and suitability of a regulatory scheme that would allow a programming distributor unilaterally to undermine the vital purposes served by the congressionally-mandated retransmission consent requirement.

In sum, construing the definition of "MVPD" so mechanically as to exclude distributors of programming that use the Internet for delivery would elevate form over substance to such an extent that those who broadcast television signals—owners of valuable property—would be unable to control the retransmission and resale of, or ensure fair compensation for, use of that property by others. Such an interpretation would amount to "definitional theft": construing statutory language to actually thwart property protection. The Commission should avoid such an indefensible and unnecessary result.

## Conclusion

For the foregoing reasons, the Affiliates Associations respectfully request that the Media Bureau interpret the term "multichannel video programming distributor" as it is defined in

[28] *See Notice*, ¶ 9.

Section 602(13) of the Act to encompass all entities that distribute multiple streams or networks of linear video programming to subscribers, including those that distribute that programming via the Internet.

Respectfully submitted,

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May 14, 2012